IN THE SUPREME COURT OF MISSOURI

RICHARD HOOVER, **Plaintiff/Appellant,** **v.** **MERCY HEALTH,** **d/b/a MERCY HEALTH SYSTEM,** **et al.,** **Defendants/Respondents.**	**No.: SC92788**

Appeal from the Circuit Court of the Twenty-First Judicial Circuit
St. Louis County

Cause No. 11SL-CC02597

The Honorable James R. Hartenbach
Division 14

APPELLANT'S SUBSTITUTE REPLY BRIEF

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INTRODUCTION

The chief issue raised in Appellant's Amended Petition is that Respondents charged and collected from him more than the reasonable value of their goods and services in violation of the MMPA. (LF 66-75). Paragraphs 39 through 46 of the Amended Petition allege a claim under the MMPA: (1) Appellant purchased medical goods and services from Respondents; (2) for personal purposes; and he (3) paid more than the reasonable value of those goods and services; (4) as a result of Respondents' unfair billing practices. (LF 71-75); *Chochorowski v. Home Depot U.S.A, Inc.*, 295 S.W.3d 194, 198 (Mo. App. E.D. 2009) (citation omitted).

Appellant is before this Court because the Eastern District failed to review his Amended Petition to determine whether it stated a claim under the MMPA as it should have done. *Hoover v. Mercy Health*, No. ED 97495, 2012 WL 2549485 *2-3 (Mo. App. E.D. July 3, 2012). Instead, the Eastern District *sua sponte* held that Respondents' motion to dismiss was converted to a motion for summary judgment because the parties introduced matters outside the pleadings. *Id.* The court made this finding despite the fact that the parties never received notice that the motion was so converted, and were not afforded the opportunity to present "all material made pertinent" to a summary judgment motion as required by the Supreme Court Rules and legal precedent. Rule 55.27(a). Because Appellant did not receive notice from the trial court that the motion was being treated as a summary judgment, and was not afforded the chance by the trial court to present all material pertinent to his opposition argument, the Eastern District's holding that Respondents' motion was converted to a summary judgment violated Appellant's

constitutional right to procedural due process of law. Had Appellant known that the motion was going to be converted to a summary judgment motion, and that matters outside the pleadings were going to be taken as uncontroverted facts, Appellant could, and would have, demonstrated that there were genuine issues of material fact in dispute necessitating discovery and a trial on the merits.

Therefore, this Court, like the dissent in the Eastern District, should treat Respondents' motion to dismiss as such, and find that: "[t]he plaintiff has invoked substantive principles of law that entitle him to relief under the MMPA." *Hoover*, 2012 WL 2549485 at *7.

REPLY POINT I

I. APPELLANT'S BRIEF IS NOT PROCEDURALLY DEFICIENT.

Substantial compliance with Rule 84.04 is sufficient to invoke an appellate court's authority to hear the case. *FIA Card Services, NA. v. Hayes*, 339 S.W.3d 515, 517 (Mo. App. E.D. 2011) (citation omitted); (Appendix A1). Review of Appellant's Brief shows that he substantially complied with Rule 84.04(c) and (i).

Furthermore, Respondents repeatedly fail to cite the legal file themselves. (*See e.g.* Resp't's Substitute Br. 61 n.12, 25, 37 n.9, 38-39, 45). Charging Appellant with failing to follow Rule 84.04 while failing to follow it themselves is disingenuous.

Respondents' request for dismissal of Appellant's appeal should therefore be denied.

REPLY POINT II

II. IT WAS ERROR TO TREAT AND DECIDE RESPONDENTS' MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT.

Respondents urge this Court to treat Respondents' motion to dismiss Appellant's Amended Petition as a motion for summary judgment "if necessary to affirm the trial court's judgment of dismissal," arguing that such treatment is appropriate "because [Appellant] introduced evidence beyond the scope of his pleadings and did not object to the evidence that Defendants introduced." (Resp't's Substitute Br. 21).

Rule 55.27(a) of the Supreme Court Rules states that "[i]f, on a motion…to dismiss for failure…to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04." Rule 55.27(a). It further provides that "[a]ll parties shall be given reasonable opportunity to present all material made pertinent to such a [summary judgment] motion by Rule 74.04." Rule 55.27(a) (emphasis added).

Were a trial court to consider matters outside the pleadings and treat the motion to dismiss as a motion for summary judgment, it "must give notice to the parties that it is going to do so." *Raster v. Ameristar Casinos, Inc.*, 280 S.W.3d 120, 126-27 (Mo. App. E.D. 2009) (citing *Platonov v. The Barn L.P.*, 226 S.W.3d 238, 240 (Mo. App. E.D. 2007)). When a trial court intends to convert a motion to dismiss, it must also "afford [the parties] an opportunity to prepare their respective motion and response accordingly." *Id.* at 127 (citing *Platonov*, 226 S.W.3d at 240). It is error for the trial court to fail to

"expressly" convert the motion to dismiss to a motion for motion for summary judgment and to fail to give notice to the parties that it was doing so. *Id.* at 127 (citing *Platonov*, 226 S.W.3d at 240). The same should be true for the appellate court.

In *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co., L.P.*, 75 S.W.3d 247 (Mo. banc 2002), this Court recognized the procedure that must be followed when a court dismisses an action based on a judgment on the pleadings after considering matters outside the pleadings:

> Rule 55.27(b) permits a trial court to treat a motion for judgment on the pleadings as a motion for summary judgment if matters outside the pleadings are presented. A trial court must give notice to the parties and an opportunity to present opposing materials.

75 S.W.3d at 255 n.6 (citation omitted) (emphasis added).

Here, Respondents were the first party to introduce matters outside the pleadings when it filed its memorandum in support of its motion to dismiss. (LF 25, 32, 41). Not only did Respondents attach the agreement at issue, but they also first introduced the issue of Appellant's insurer's denial of coverage, and the actual amount billed by Respondents. (LF 25). They also misstated to the trial court that Appellant had paid nothing toward his bill. (LF 25). Appellant addressed this falsehood in his memorandum in opposition by including a collections letter from Respondents' collection agency. (LF 90-91). Appellant also discussed his insurer's denial of coverage. (LF 85).

Appellant also filed an amended petition. (LF 62-80). Respondents filed a motion to dismiss Appellant's amended petition, and memorandum in support thereof with

additional exhibits attached. (LF 117-152). Appellant did not file a response to this motion. Respondents never filed a motion for summary judgment.

The record contains no evidence that the trial court considered matters outside the pleadings.

The trial court provided no notice that the motion to dismiss was being converted to a summary judgment.

The record contains no evidence that the trial court ruled upon the motion to dismiss as a summary judgment.

The record contains no statements of uncontroverted facts that were admitted or denied pursuant to Rule 74.04 because none exist.

There is therefore nothing upon which the appellate court can treat the motion to dismiss as a summary judgment motion and decide it as such.

Respondents urge this Court to do the same: rule on their motion on the merits, on their contention that Appellant has not sustained an ascertainable loss. (Resp't's Substitute Br. 57). This contention is based upon a purported comment made by Appellant's counsel to the media that Respondents introduced in their motion to dismiss, which Appellant disputes and denies was made, and which Appellant disputes and denies is true but, at the very least, something that Appellant should be given the opportunity to refute as permitted by this Court's Rules. (Resp't's Substitute Br. 20; LF 117-152). Respondents encourage this Court to take this purported comment as an admitted fact, and find that Appellant paid only what he considered to be a reasonable amount. (Resp't's Substitute Br. 20, 57-61). Respondents argue that such a finding would defeat

Appellant's claim because Appellant would have paid Respondents what he contends they are entitled to, and would have suffered no ascertainable loss under *Freeman Health System v. Wass*, 124 S.W.3d 504 (Mo. App. S.D. 2004). (Resp't's Br. 57-61).

However, such a finding conflicts with the Supreme Court Rules, opinions of the courts of this state and Appellant's constitutional right to procedural due process of law.

"Summary judgment is an extreme and drastic remedy because it borders on denial of due process in that it denies the opposing party his day in court." *Olson v. Auto Owners Ins. Co.*, 700 S.W.2d 882, 884 (Mo. App. E.D. 1985). Compliance with the procedural requirements for summary judgment is mandatory. *Lawson v. St. Louis-San Francisco Railway Co.*, 629 S.W.2d 648, 649-650 (Mo. App. E.D. 1982). Failing to strictly comply with the mandatory procedural requirements deprives a plaintiff of his constitutionally-protected rights to due process and a fair trial.

Respondents cite several other appellate panels for the general proposition that actual notice by the trial court that the motion is being converted to a summary judgment motion is not required when a party or parties introduce matters outside the pleadings. *See, e.g. VinStickers, LLC v. Stinson Morrison Hecker,* 369 S.W.3d 764 (Mo. App. W.D. 2012); *Wilson v. Cramer*, 317 S.W.3d 206 (Mo. App. W.D. 2010); *Brown v. Simmons*, 270 S.W.3d 508 (Mo. App. S.D. 2008).[1] However, the facts in these cases are

[1] *Mitchell v. McEvoy*, 237 S.W.3d 257 (Mo. App. E.D. 2007) and *Osage Water Co. v. City of Osage Beach*, 58 S.W.3d 35, 41 (Mo. App. S.D. 2001) are also distinguishable. In *Mitchell*, the plaintiff conceded that motion was converted, which is not the case here.

distinguishable, in that in those cases, the matters outside the pleadings were considered by the trial courts. Here, there is no evidence in the record that the trial court considered matters outside the pleadings. The trial court Order stated only that: "Defendant's Motion to Dismiss heretofore called, argued and submitted is hereby sustained. Costs taxed against Plaintiff." (LF 153).

Respondents' reliance on *Reed v. Director of Revenue*, 184 S.W.3d 564 (Mo. banc 2006) is misplaced. In *Reed*, this Court held that the plaintiff's motion for a judgment on the pleadings was converted to a summary judgment motion under Rule 55.27(b), as the plaintiff had introduced matters outside the pleadings and the trial court provided the defendant/appellant with the opportunity "to present additional facts for the court to consider in ruling on the motion." 184 S.W.3d at 566. This Court found that the motion was converted to a summary judgment due to the trial court's compliance with procedural requirements, in that the defendant was "given reasonable opportunity to present all materials made pertinent to such a motion." Rule 55.27(b). This Court did not appear to find that the motion was automatically converted when the parties introduced matters outside the pleadings absent compliance with procedure.

Respondents also rely on *ADP Dealer Services Group v. Carroll Motor Co.*, 195 S.W.3d 1, 6 (Mo. App. E.D. 2005) and *Fulkerson v. W.A.M. Investments*, 85 S.W.3d 745, 749-50 (Mo. App. S.D. 2002) for the suggestion that a party "acquiesces" to such a

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237 S.W.3d at 259. *Osage* appears to have been a motion converted by the trial court, which is also not the case here. 58 S.W.3d at 40.

conversion when it fails to object to the introduction of matters outside the pleadings, refers to, or introduces the matters itself. However, in *Platonov*, *supra*, notice was required despite the fact that both parties had presented matters outside of the pleadings. 226 S.W.3d at 239-40. In *RGB2, Inc.*, *infra*, the plaintiff had to have the opportunity to present additional material pursuant to Rule 74.04 although it was the plaintiff who had introduced matters outside the pleadings. 103 S.W.3d at 425. Accordingly, this Court should not follow the opinions cited by Respondents.

The Eastern District's elimination of the notice requirement here conflicts with pronouncements of this rule by this Court, and other appellate panels of this state. *L.A.C. ex rel. D.C.*, 75 S.W.3d at 255 n.6; *Raster*, 280 S.W.3d at 126-127; *Breeden v. Hueser*, 273 S.W.3d 1, 15 (Mo. App. W.D. 2008) ("The motion will not be treated as one for summary judgment...where the record contains no evidence that the trial court considered matters outside the pleadings or notified the parties that it intended to review the pleadings and documents as a summary judgment motion." (citation omitted)); *Platonov*, 226 S.W.3d at 240; *RGB2, Inc. v. Chesterfield Plaza, Inc.*, 103 S.W3d 420, 425 (Mo. App. S.D. 2003); *Shouse v. RFB Const. Co., Inc.*, 10 S.W.3d 189, 192 (Mo. App. W.D. 1999). It also conflicts with Rule 55.27, which provides that the parties must have a "reasonable opportunity to present all materials pertinent to such a motion by Rule 74.04." Rule 55.27(a) and (b). This rule clearly means that the parties must be notified that the motion is being converted. A failure to do so results in a violation of Appellant's constitutional right to procedural due process of law.

Accordingly, this Court should treat Respondents' motion as a motion to dismiss, and reverse and remand this case to the trial court for further proceedings.

REPLY POINT III

III. WHEN PROPERLY REVIEWED AS A MOTION TO DISMISS, APPELLANT SUFFICIENTLY ALLEGED AN ASCERTAINABLE LOSS RESULTING FROM RESPONDENTS' MMPA VIOLATIONS.

A. Standard of review is *de novo*.

The standard of review on a motion to dismiss is de novo. *Devitre v. Orthopedic Center of St. Louis, LLC*, 349 S.W.3d 327, 331 (Mo. banc 2011) (citation omitted).

Respondents argue that the Court should consider matters outside the pleadings "that the plaintiff admits in his appellate briefs...or in his trial court memoranda." (Resp't's Substitute Br. 18). Omitted matters are considered by an appellate court as part of the petition where the "brief on appeal admits facts omitted from the petition that if true will defeat plaintiff's cause of action" and "when the plaintiff agrees the omitted facts are true." *Magee v. Blue Ridge Professional Bldg. Co., Inc.*, 821 S.W.2d 839, 843 (Mo. banc 1991). However, only the first "fact" listed by Respondents accurately sets forth an exact statement made by Appellant. (Resp't's Br. 19-20). Respondents inaccurately cite, mischaracterize, and misrepresent statements numbers two through nine made by Appellant. (Resp't's Substitute Br. 19-20). Particularly, Respondents characterize statement number nine as having been "concede[d]" by Appellant, when Appellant's Amended Reply Brief merely stated that whether or not comments were made to the media is of no relevance to the motion to dismiss. (Resp't's Substitute Br. 20). As said above, Appellant disputes and denies any such comment was made, and disputes and denies it as true. Accordingly, these statements are not, and cannot be,

"facts that Hoover has admitted," because Appellant did not make them. (Resp't's Substitute Br. 20). These statements are only matters outside the pleadings, not admissions, and this Court should review only whether Appellant stated a cause of action within the four corners of the Amended Petition.

B. Appellant properly pleaded that he sustained an ascertainable loss as a result of Respondents' violation of the MMPA.

1. Appellant sufficiently pleaded an ascertainable loss.

Respondents – relying on the Eastern District's opinion in this case - also charge that Appellant failed to plead an ascertainable loss because his allegation that he "paid more for the goods sold and the services rendered than the reasonable value of the goods and services" (LF 75) "is a mere conclusion that is unsupported by any factual allegations demonstrating how or why the amount he paid was more than the reasonable value of his medical care." (Resp't's Substitute Br. 63).

However, the dissent in the court below found that Appellant adequately alleged damages in his amended petition. *Hoover*, 2012 WL 2549485 at *8. The dissent stated that "while plaintiff is required to state ultimate facts, he is not required to plead the facts or circumstances by which the ultimate facts will be established." *Id.* (citing *Scheibel v. Hillis*, 531 S.W.2d 285, 290 (Mo. banc 1976)). Clearly, Appellant pleaded an "ultimate fact" when he alleged that he paid Respondents more than the reasonable value of Respondents' good and services. (LF 75).

Requiring Appellant "to plead the facts and circumstances by which the ultimate facts will be established" would require Appellant to prove his damages in his petition.

Hoover, 2012 WL 2549485 at *8 (citing *Scheibel*, 531 S.W.2d at 290). No plaintiff can prove that he sustained damages in his petition, and no plaintiff is required to prove that he sustained damages in his petition. As pointed out by the dissent in the court below:

> [Appellant] is hardly in a position to further plead how damages are to be ascertained because it rightly rests with the finder of fact to determine the reasonableness of the charges he has paid. The most the [Appellant] can presently allege as damages is that which he has pleaded. He paid more than a reasonable amount.

Hoover, 2012 WL 2549485 at *8.

As such, Appellant sufficiently pleaded that he sustained an ascertainable loss. On a motion to dismiss, this Court must accept as true the allegation in Appellant's Amended Petition that he paid more than the reasonable value of the goods and services. (LF 75).

However, Respondents rely on *Freeman*, *supra*, for the proposition that Appellant did not sustain an ascertainable loss because he is still ahead for the treatment he received.[2] (Resp't's Substitute Br. 61). Respondents state that Appellant paid 30.5 percent of the billed charges, and because Appellant alleges that the best evidence of

[2] Respondents' reliance on the St. Louis County Circuit Court dismissals is unfounded because the courts did not issue written opinions explaining the grounds for dismissal. Additionally, it is unclear whether the patient was uninsured in *Lester E. Cox Medical Centers Springfield, Missouri v. Huntsman*, 2003 WL 22004998 (W.D. Mo. Aug. 5, 2003).

reasonable value is the amount paid by insurers, or roughly 40 percent, then Appellant is still ahead, as he paid less than what an insurer would have paid. (Resp't's Substitute Br. 61).

Again, Appellant need only plead that he sustained an ascertainable loss in his Amended Petition, which he did. (LF 75). Appellant's Amended Petition not only alleges that the amount paid by insurers is evidence of value, but also that the amounts accepted in satisfaction of Respondents' standard charges and from Medicare are also evidence of value of the services. (LF 71-72). The figures cited by Appellant in his Brief are nothing more than examples of the degree to which hospitals inflate their charges to provide this Court with the context of the claim. Moreover, in *Quinn*, the court stated that "persons who did not pay their bill in full...stated a claim because they were damaged by simply being 'charged' an unreasonable amount." 2007 WL 7308622 at *5. Thus, a plaintiff need not pay his or her bill in full to state an ascertainable loss under the MMPA. Appellant is therefore not "ahead for the medical goods and services." *Freeman*, 124 S.W.3d at 508.

Respondents also argue that Appellant did not sustain an ascertainable loss "as a result of" Respondents' MMPA violations because Appellant made those payments believing Respondents to be legally entitled to them. (Resp't's Substitute Br. 62). Appellant alleged that as a result of Respondents' conduct (LF 71-74, ¶¶39, 42-43), he paid Respondents more than the reasonable value of their goods and services, and sustained an ascertainable loss. (LF 75). That is all that Appellant had to allege. However to address Respondents argument, Respondents hired bill collectors to collect

their billed charges from Appellant. (LF 103-106). If Appellant did not pay, he risked further damage to his credit. Appellant clearly alleged that he sustained an ascertainable loss "as a result of" Respondents' MMPA violations.

2. Damage to credit is sufficiently alleged, and recoverable under the MMPA.

Respondents contend that the Amended Petition does not allege any injury to Appellant's credit, and does not explain how Respondents damaged his reputation. (Resp't's Substitute Br. 64). They further contend that damage to reputation or credit is not an ascertainable loss under the MMPA. (Resp't's Substitute Br. 64).

First, Appellant need not specifically allege that he sustained damage to his credit. Damage to credit reputation is a type of "damage to reputation." As such, Appellant clearly alleged damage to his credit reputation in Paragraph 46 of his Amended Petition. (LF 75). The reasonable conclusion from the allegations in the Amended Petition is that Appellant was a victim of Respondents' illegal collection practices, and sustained damage to his credit reputation "as a result of" those practices.

Second, neither *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855 (Mo. banc 2008), nor *State ex rel. BP Products North America, Inc. v. Ross*, 163 S.W.3d 922 (Mo. banc 2005) holds that injury to an individual's credit reputation cannot constitute an economic damage under the MMPA. Also, *Freeman* is inapposite because that plaintiff paid nothing toward his bill, and did not plead credit damage. (Resp't's Substitute Br. 65-66).

Because the MMPA supplements the definition of common law fraud, remedies of common law fraud have applied in MMPA actions. *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883, 886 (Mo. App. E.D. 1994) (citation omitted). One such remedy available for fraud claims is recovery for damage to reputation. *See Finley v. River North Records, Inc.*, 148 F.3d 913, 918-20 (8th Cir. 1998); *Industrial Testing Laboratories, Inc. v. Thermal Science, Inc.*, 953 S.W.2d 144, 145-47 (Mo. App. E.D. 1997); *Bramon v. U-Haul, Inc.*, 945 S.W.2d 676, 683-84 (Mo. App. E.D. 1997). Appellant and the plaintiff class will attempt to quantify the damage to their credit reputation sustained as a result of Respondents' illegal practices. Respondents' suggestion that such damages would impermissibly expand the scope of the MMPA is unsupported in light of *Sunset*.

Appellant clearly alleged that he sustained an ascertainable loss as a result of Respondents' illegal and unfair billing practices, rendering dismissal improper.

C. Appellant asserted a legally-sufficient factual basis supporting his claim that Respondents overcharged him in violation of the MMPA.

1. Respondents' overcharging of Appellant is sufficiently alleged.

Respondents argue that Appellant fails to allege a sufficient factual basis that establishes he was charged more than a "reasonable" charge in violation of the MMPA. (Resp't's Substitute Br. 37). However, Appellant alleged a strong basis for his claim that Respondents' standard charges are not reasonable. (*See e.g.* LF 71-73, ¶39(b),(i),(p), ¶42(a),(c),(d)). Also, contrary to Respondents' assertion that Appellant elected not to buy

a policy that provided coverage, Appellant believed the procedure to be covered, as he "received pre-approval from his health insurance carrier for payment of the costs of the medical procedure." (Resp't's Substitute Br. 37-38; Appellant's Br. 2). Respondents further contend that Appellant has no right to discounts afforded insured and Medicare patients, and that a "reasonable" charge is not based on these discounts. (Resp't's Substitute Br. 37-57). Respondents miss the point.

a. Appellant does not allege that he is entitled to discounts.

Respondents argue that Appellant is not entitled to a discounted amount because Appellant is not a beneficiary or a party to Respondents' contracts with insurance companies, and is not similarly-situated to Medicare patients. (Resp't's Substitute Br. 37-40). Appellant never alleged in his Amended Petition that he is entitled to the discounts provided to insured or Medicare patients. Appellant only refers to these discounts, which are accepted by Respondents a vast majority of the time, because they are evidence of the reasonable value of Respondents' goods and services.

b. Discounted amounts are evidence of the reasonable value of Respondents' goods and services.

In support of their argument that discounts are not relevant in determining reasonable value, Respondents first argue that uninsured patients are not entitled to be charged based on discounts because they are not similarly situated to insured and Medicare patients. (Resp't's Substitute Br. 40-43). First, Missouri law provides that the discounted amounts paid by insurers and Medicare can constitute the reasonable value. Mo. Rev. Stat. §490.715.5; *Deck v. Teasley*, 322 S.W.3d 536, 540 (Mo. banc 2010).

Second, the *Quinn* court accepted the plaintiffs' method of proving that the defendants' chargemaster rates were unreasonable by showing the amounts "usually and customarily paid" by insureds and recipients of government programs. *Quinn,* 2007 WL 7308622 at *7-9.

Respondents next argue that offering volume-pricing discounts to only some buyers is lawful. (Resp't's Substitute Br. 43). Again, Appellant only argues that these discounts are more representative of the reasonable value of Respondents' goods and services than their standard charges – a point not refuted. Respondents also do not claim that they must offer their goods and services at prices far below their reasonable value in order to offer these discounts – an indicator that this is not so.

Respondents further argue that courts reject the notion that discounts are relevant in determining reasonable value and entitle a patient to pay less than the billed charge, greatly relying upon *Collection Professionals, Inc. v. Schlosser*, 977N.E.2d 315 (Ill. App. Ct. 2012) (Resp't's Substitute Br. 45-48), which involved a collection agency's suit against a patient, as an assignee of a hospital.[3] 977 N.E.2d at 317. Like Appellant's point here, the court pointed out that in the absence of a price term, a reasonable price is

[3] Respondents' reliance on *Holland*, 791 N.W.2d at 727-32, *Parnell v. Madonna Rehabilitation Hospital*, 602 N.W.2d 461, 463-65 (Neb. 1999), and *Munson Medical Center v. Auto Club Ins. Association*, 554 N.W.2d 49, 52-54 (Mich. App. 1996) is misplaced, as the courts were more focused on statutory and/or contract interpretation rather than the reasonableness of the discounted prices.

implied, and the hospital "must prove that the charges are reasonable." *Id.* at 319-20. However, Respondents have offered no such proof.

Moreover, Missouri law supports the argument that discounted amounts provided to *other* patients can be evidence of reasonable value. *See Quinn,* 2007 WL 7308622 at *8; *Miller v. Horn,* 254 S.W.3d 920, 925 (Mo. App. W.D. 2008) (the reasonable value of services "is the price customarily paid for such services at the time and locality in question.").

Respondents cite *Brown v. Van Noy*, 879 S.W.2d 667 (Mo. App. W.D. 1994) for the proposition that Missouri courts reject the contention that a hospital's standard charges are not reasonable because of Medicare write-offs. (Resp't's Substitute Br. 48-49). *Brown* holds that Medicare payments and write-offs should be treated no differently than if the patient or the insurer made the payments. 879 S.W.2d at 676. It further holds that the amounts charged or paid are amounts that can be submitted to a jury as medical expenses, which are determined to be reasonable unless challenged. *Id.* The standard charges were accepted as reasonable because there was no "evidence challenging the reasonableness of the ordinary medical expenses actually charged", not because the standard charge was automatically deemed reasonable. *Id.*

Missouri law clearly provides that discounts - whether they are provided for services rendered to Appellant or *other* patients - can constitute evidence of reasonable value.

Respondents also contend that Appellant's claim mistakenly rests on the premise that all insurers and governmental payers pay a "uniform" amount to Respondents and

that this "uniform" amount defines reasonable value. (Resp't's Substitute Br. 50). However, Appellant alleged only that Respondents accept different amounts from different payers. (LF 71, ¶39(e); LF 77, ¶56). Furthermore, Appellant never alleged in the Amended Petition that a reasonable value would be determined in the fashion Respondents' suggest. Respondents' claims to the contrary are false.

Last, Respondents charge that Appellant cannot rely on Mo. Rev. Stat. §490.715.5 to support the claim that discounts are evidence of reasonable value because the statute applies only in personal injury cases. (Resp't's Substitute Br. 51). They also argue that "the reasonable value of medical care can be the health care provider's full billed charges and is not based on the discounts afforded to insurers and governmental payers for other patients." (Resp't's Substitute Br. 51-52).

Pursuant to Missouri law[4], there is a rebuttable presumption that the reasonable value of services provided to a patient is the amount that is necessary to satisfy the patient's financial obligation to the health care provider. Mo. Rev. Stat. §490.715.5. The parties may rebut the presumption by presenting evidence of the amount billed, the amount paid, and the amount a party is obligated to pay in the event of a recovery. *Id.* If the presumption is rebutted - whether it be through evidence of the amount paid or billed - then all evidence of value is submitted to the jury; if it is not, the only evidence of value submitted to the jury is the amount necessary to satisfy the providers. *Deck*, 322 S.W.3d

[4] Missouri law concerning pre-2005 tort reform statutes is inapplicable.

at 540. *Deck* holds that if the presumption is rebutted, a jury determines reasonable value.[5]

Deck rejects Respondents' argument that discounts - or the amount actually paid - are not relevant in determining reasonable value and that Respondents are always entitled to the amount billed. *Deck* supports Appellant's position that discounts can be considered the reasonable value of the services, and that "reasonableness" is a jury determination.

Again, Respondents' contention that the discounted amounts provided to *other* patients cannot be evidence of reasonable value (Resp't's Substitute Br. 54-55) flies in the face of *Quinn*. 2007 WL 7308622 at *8.

2. Respondents are not entitled to their standard charges.

Respondents argue that they are entitled to their standard charges because their "express contract" with Appellant provides a method to determine the price of the services rendered and is not a contract of adhesion. (Resp't's Br. 22-34). These arguments are both legally and factually incorrect, and contradict Respondents' position in their own collection suits.

[5] Respondents mistakenly rely on several Missouri cases for the proposition that discounts are not evidence of value, as these courts were merely determining whether substantial evidence was presented to rebut the statutory presumption.

First, Appellant denies that the agreement he entered into with Respondents was an "express contract", as all of the terms were not explicitly set out. *Black's Law Dictionary* 344 (8th ed. 2004).[6]

Second, Respondents' position that their contract provides a method to determine price is unsupported by Missouri law. "It has been the general rule that an agreement must fix a price or provide a method to ascertain the price in order to form an enforceable contract." *Allied Disposal, Inc. v. Bob's Home Service, Inc.*, 595 S.W.2d 417, 419 (Mo. App. E.D. 1980) (citation omitted); *Olathe Millwork Co. v. Dulin*, 189 S.W.3d 199, 204 (Mo. App. W.D. 2006) ("[T]he long-recognized general rule in Missouri is that a contract must include a definite price to be binding."). A contract is not deemed open "where price to be paid for work performed is ascertained by a method of measurement specified by the contract." *Kranz v. Kansas* City, 573 S.W.2d 88, 91 (Mo. App. Ct. 1978) (emphasis added). An exception to the rule that there is no enforceable contract when there is no statement as to price is in situations where the contract has been executed, and "the law implies a standard of reasonableness." *Allied Disposal, Inc.*, 595 S.W.2d at 419 (citation omitted).

Respondents' agreement with Appellant uses only the terms "Facility charges" and "billed charges." (LF 41). Remarkably, Respondents contend that these terms "can only

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[6] Even the cases cited by Respondents in support of this claim state that the promises have to be "explicit" in order to constitute an "express contract." (Resp't's Substitute Br. 23-24).

refer to Mercy's uniform set of charges found in its chargemaster," which they consider the method to determine price. (Resp't's Substitute Br. 25, 31). Yet nowhere do these terms refer to the Respondents' chargemaster. Additionally, any difficulty in predetermining a patient's bill does not excuse Respondents' failure to refer to the chargemaster, and to alert Appellant to its existence. (Resp't's Substitute Br. 26; LF 41). Further, whether these chargemaster prices were fixed in advance, or whether Appellant could have learned what the "approximate" charge would be is wholly irrelevant, as the agreement itself fails to specify a method of measurement of price. (Resp't's Substitute Br. 27). Despite this deficiency, Respondents still suggest that the chargemaster prices are somehow "incorporated" into their agreement with Appellant. (Resp't's Substitute Br. 31). To suggest that an extrinsic document is incorporated into an agreement without any reference to it renders the agreement illusory. Furthermore, the agreement fails to fix a price. (LF 41).

Because Respondents' agreement fails to fix a price and to specify a method of measurement by which the price can be ascertained, Missouri law implies a reasonable price. *Allied Disposal, Inc.*, 595 S.W.2d at 419 (citation omitted); *Kranz*, 573 S.W.2d at 91. This was confirmed by the dissenting opinion in the court below. *Hoover,* 2012 WL 2549485 at *7.

Third, the opinions cited by Appellant are persuasive.[7] Respondents state that while the contract at issue in *Doe v. HCA Health Services of Tennessee, Inc.*, 46 S.W.3d 191 (Tenn. 2001), failed because the term "charges" was not defined, a contract using the terms "Facility's rates and terms" was held to be sufficiently definite to enforce payment of the hospital's chargemaster rates in *Woodruff v. Fort Sanders Sevier Medical Center*, 2008 WL 148951 (Tenn. Ct. App. Jan. 16, 2008). (Resp't's Substitute Br. 32-33). However, in *Woodruff*, the court held that the contract was enforceable because "facility's rates and terms" referred to a "'document, transaction or other extrinsic facts,'" which advised the patient that the hospital had already set the prices. 2008 WL 148951 at *3. There is no such language here, and no fair reading of the agreement terms indicates a fixed specified price.

Respondents also argue against Appellant's reliance on *Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc.*, 832 A.2d 501 (Pa. Super. Ct. 2003) because it does not concern an "express contract." (Resp't's Substitute Br. 34). First, Respondents' agreement is not an "express contract." Second, Respondents overlook the case's chief principle: the hospital's billed charges do not represent the reasonable value of its goods and services because the hospital does not normally accept or receive those amounts as payment. *Temple*, 832 A.2d at 508-10. This principle is exactly on point.

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[7] Respondents are silent on *Colomar v. Mercy Hospital, Inc.*, 461 F.Supp.2d 1265 (S.D. Fla. 2006).

Respondents further imply that *Quinn* does not call for the application of a reasonable price because the price fixed for Appellant's treatment was their standard charges. (Resp't's Substitute Br. 33-34). However, *Quinn* held that terms like "charges" and "regular charges" do not sufficiently fix a price. *Quinn*, 2007 WL 7308622 at *6. Respondents' terms "Facility charges" and "billed charges" are similar to the terms used by the defendant in *Quinn*, and likewise do not fix a price. A reasonable price is therefore implied.

Respondents' claim that "Facility charges" and "billed charges" refer to their chargemaster rates is not supported by a single Missouri case. (Resp't's Substitute Br. 25). Respondents' reliance on *Holland v. Trinity Health Care Corp.*, 791 N.W.2d 724, 729 (Mich. Ct. App. 2010), *Cox v. Athens Reg. Med. Ctr., Inc.*, 631 S.E.2d 792, 797 (Ga. Ct. App. 2006), *Harrison*, 430 F.Supp.2d at 595-96, and *Elliott Hospital v. Boerner*, No. 04-C-739, at *11 (N.H. Sup. Ct. July 15, 2005) is misplaced because the language used in those cases is far more descriptive than Respondents' language.

Interestingly, Respondents' argument contradicts the position that they take in their collection suits where they sue based on an action on account, rather than breach of contract. On an action on account, a hospital must show that its charges were reasonable. Missouri Approved Instructions 26.03 (Appendix 5). Reasonableness of the charges is not an element in a breach of contract case. Missouri Approved Instructions 26.02 (Appendix 6). Because Respondents sue their patients on account rather than for breach of contract, Respondents clearly believe that they are entitled only to a reasonable amount. Their silence on this point in their Substitute Brief speaks volumes.

Last, Respondents deny that their agreement is a contract of adhesion that allows Appellant to pay only a reasonable amount. (Resp't's Substitute Br. 35). Respondents cite three cases for the proposition that Appellant must allege that he was required to obtain treatment from Respondents, or that he could not have obtained treatment elsewhere.[8] (Resp't's Substitute Br. 35). Yet these cases do not hold that dismissal is mandated in an MMPA case where a party does not make these allegations. Because the Appellant alleged that Respondents' agreement was a contract of adhesion, it must be taken as true on a motion to dismiss. (LF 71, ¶39(a)).

Additionally, Respondents' argument that *Heartland Health Systems, Inc. v. Chamberlin,* 871 S.W.2d 8 (Mo. App. W.D. 1993) establishes that the objective reasonable expectation of a party who signs a hospital's contract is that he will pay the hospital's charges, omits the fact that the hospital had to prove that its charges were reasonable. (Resp't's Substitute Br. 36-37). *Heartland* therefore stands for the proposition that a hospital's contract of adhesion with its patients must set forth a reasonable price.

Because Respondents cannot collect their standard charge as a matter of law, Appellant's MMPA claim must stand.

c. Respondents violated the MMPA by charging Appellant their standard charges.

[8] These cases do not concern contractual pricing. (Resp't's Substitute Br. 35 n.8).

Respondents argue that even if Appellant was "entitled to *pay* Mercy based on the discounted amounts that Mercy would have received from insurers and Medicare, the fact that Mercy *charged* him its standard, chargemaster rate did not violate the MMPA." (Resp't's Substitute Br. 56). Respondents argue that this is so because Missouri courts have allowed medical providers to charge and collect for medical care based on their standard chargemaster rates, and allowed personal injury plaintiffs to recover the same from tortfeasors. (Resp't's Substitute Br. 56). However, the cases upon which they rely are not dispositive, as the standard charges at issue in these cases were proven to be reasonable by the plaintiff hospitals. (Resp't's Substitute Br. 56). Thus, the hospitals were allowed to charge and collect their standard charges because they proved that those charges were reasonable. Here, Respondents somehow erroneously believe that as a matter of law, they are entitled to charge and collect their standard charges without proving that those charges are reasonable.

Additionally, the *Quinn* court stated that merely being charged an unreasonable amount states a claim. 2007 WL 7308622 at *5.

Moreover, Appellant not only has pleaded, and will prove, that Respondents' charges are unfair, but also that Respondents conceal and suppress material facts concerning the nature of their standard charges. (LF 71-73).

Appellant's Amended Petition alleges a legally-sufficient factual basis that Respondents overcharged him in violation of the MMPA. This Court should reverse and remand this case to the trial court for further proceedings.

D. Appellant stated claims under the MMPA for "double-billing" and "upcoding."

Respondents argue that Appellant's allegations against them for "double-billing" and "upcoding" fail to state a claim. (Resp't's Substitute Br. 66-68). However, Appellant sufficiently alleged this claim in Paragraphs 44 through 46 of the Amended Petition, rendering dismissal on this basis improper because no greater specificity is needed in an action under the MMPA. (LF 74-75). "[A] claim alleging violations of the MMPA does not necessarily need to be stated with the same particularity as a claim of common law fraud or mistake." *Ullrich v. CADCO, Inc.*, 244 S.W.3d 772, 777 (Mo. App. E.D. 2008).

Appellant's claim must therefore stand.

REPLY POINT IV

IV. APPELLANT'S CLAIM AGAINST RESPONDENT MERCY HEALTH IS SUFFICIENTLY ALLEGED.

Respondents argue that Mercy Health is not a proper defendant because Appellant received treatment from Mercy, not Mercy Health, and because Appellant's agency claim is not sufficiently alleged. (Resp't's Substitute Br. 85). As aforesaid, Appellant disputes and denies the statements set forth in Respondents' Substitute Brief which inaccurately set forth "Mercy," as the sole responsible party. (Resp't's Substitute Br. 19-20). Appellant alleged that all of the Respondents issued a bill to Appellant. (LF 41, ¶41). Specifically, Appellant alleged that Respondent Mercy Health owns and operates Respondent St. John's Mercy Medical Center and that Respondent Mercy Health owns and operates Mercy Health System, of which both Respondents Mercy Hospital East Communities and St. John's Mercy Medical Center are a part. (LF 65-66). Appellant further alleged that "each of the [Respondents] acted as the agent, servant and employee of the other defendants, and each of them, within the scope and course of that agency and employment." (LF 66). These allegations sufficiently set forth a basis for upon which a claim can be asserted against Respondent Mercy Health for the conduct of the other Respondents. Greater specificity is not mandated by *Summer Chase Second Addition Subdivision Homeowners Ass'n v. Taylor-Morley, Inc.*, 146 S.W.3d 411 (Mo. App. E.D. 2004) because the allegations of agency in *Summer* in no way indicated that one party had control over the other. *Summer*, 146 S.W.3d at 417-18. Here, Appellant indicated

control by alleging that Respondent Mercy Health operated Respondent St. John's Mercy Medical Center.

Appellant also alleged liability against Respondent Mercy Health apart from any agency relationship, by averring that it issued a bill for services rendered at the hospital it owns and operates which violated the MMPA. (LF 65, 73-74). This clearly states a claim against Respondent Mercy Health.

Accordingly, Appellant's claim against Respondent Mercy Health should stand, and this Court should reverse and remand for further proceedings.

CONCLUSION

WHEREFORE, Appellant respectfully requests this Honorable Court reverse and remand this matter to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As the attorney of record for Appellant, I hereby certify that the Appellant's Substitute Reply Brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.04; and
3. Contains 7,667 words as determined by the software application Microsoft Word for Windows.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that an electronic copy of this reply brief was filed and sent to below counsel via the Court's electronic filing system, this 9th day of February, 2013:

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